

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB AUG. 19,99
U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Ther-A-Pedic Associates, Inc.

Serial No. 74/150,881

Frank P. Presta of Sixbey Friedman Leedom & Ferguson for
Ther-A-Pedic Associates, Inc.

Peter Cataldo, Trademark Examining Attorney, Law Office 103
(Michael Szoke, Managing Attorney).

Before Cissel, Seeherman and Walters, Administrative
Trademark Judges.

Opinion by Cissel, Administrative Trademark Judge:

On August 14, 1996, applicant applied to register the
mark "POSTURE-MEDIC" on the Principal Register for
"mattresses and box springs," in Class 20. The application
was based on use of the mark in connection with these goods
in commerce since June 1, 1996.

The Examining Attorney refused registration under
Section 2(d) of the Act on the ground that applicant's
mark, as applied to mattresses and box springs, so

resembles the mark "POSTUREMATIC," which is registered¹ for "mattresses and box springs," that confusion is likely.

Applicant responded to the refusal to register with argument that confusion is not likely, and included with the response copies of eleven third-party registrations of marks which include the word "POSTURE" or a variant of it combined with other terms. These marks are as follows: "POSTURE AID" and design; "POSTURE-MASTER"; "POSTURE-REST"; "POSTURE-FLEX"; "POSTURTECH"; "POSTURE PROTECTOR"; "POSTURAMIC"; "POSTURE THERMIC"; "POSTURE THERAPY"; "POSTURE CORRECTOR"; and "POSTUREMOTION." The goods in these listed registrations are mattresses, box springs and other items of furniture.

Applicant argued that confusion is not likely because of differences between the marks. Further, applicant asserted that the listed third-party registrations demonstrate that the prefix "POSTURE" is weak in trademark significance, such that its use in applicant's mark and the cited mark should be given little weight in determining whether confusion is likely.

The Examining Attorney was not persuaded, however, and

¹ Registration No. 1,229,861 issued on the Principal Register to Sealy, Inc. on March 8, 1983. An affidavit under Section 8 of the Act was accepted.

the second Office Action made final the refusal to register.

Applicant timely filed a Notice of Appeal. Both applicant and the Examining Attorney filed briefs, but applicant did not request an oral hearing before the Board. We have accordingly resolved this matter based on consideration of the written record and arguments before us. We hold that registration of applicant's mark is barred under Section 2(d) of the Act by the cited registration.

Our resolution of this issue is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. In re E. I. DuPont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. Federated Food, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

The goods specified in the cited registration are identical to the goods with which applicant uses its mark. Where the goods are identical or closely related, the degree of similarity between the marks required to support a finding of likelihood of confusion is not as great as it

would be if the goods were not so closely related. ECI Division of E Systems, Inc. v. Environmental Communications, Inc., 207 USPQ 443 (TTAB 1980).

As noted in the DuPont case, supra, the marks are compared for similarities in sound, appearance and connotation. In the instant case, although the marks are not identical, they are very similar in both pronunciation and appearance. Applicant argues that its mark has a medical connotation which differs from that of the cited mark, which applicant asserts brings to mind the word "automatic," which is unrelated to the medical field. While careful consideration of the marks may result in this conclusion, the average purchasers of these consumer-oriented products are unlikely to stop and analyze the marks, and in particular, the meanings thereof. Such purchasers may not compare the marks on a side-by-side basis, and their subsequent imperfect recollections of these marks will be governed by the initial impact, appearance, and general impression each mark creates. See: Bausch & Lomb Incorporated v. Gentex Corporation, 200 USPQ 117 (TTAB 1978); and Faberge, Incorporated v. Madison Shirt Corporation, 192 USPQ 223 (TTAB 1976).

The recollection that such consumers who encounter these marks are likely to have is that they are similar in

appearance, and when pronounced, they are very similar. In order for confusion to be likely, the marks do not need to be similar in pronunciation, in appearance and in connotation; similarity in any one of these elements is sufficient. In re Mack, 197 USPQ 755 (TTAB 1977); In re Oil Well Co., 181 USPQ 656 (TTAB 1973).

Applicant argues that the third-party registrations it submitted demonstrate the weakness of the term "POSTURE" as a component of trademarks for these products, and that therefore prospective purchasers look to other elements of "POSTURE" marks in order to distinguish among such marks.

As the Examining Attorney points out, however, it is well settled that third-party registrations, by themselves, are entitled to little weight on the question of likelihood of confusion. In re Hub Distributing, Inc., 218 USPQ 284 (TTAB 1983). They are not evidence of what happens in the marketplace or that the public is familiar with the use of the marks therein. National Aeronautics and Space Administration v. Record Chemical Co., 185 USPQ 563 (TTAB 1975).

The third-party registrations submitted by applicant do indicate, and it is not disputed by the Examining Attorney, that the word "posture" has a suggestive meaning in connection with mattresses and box springs. However,

there are readily apparent differences in the commercial impressions which the listed third-party registered marks create. These marks are easily distinguished from each other and from the marks in the instant application and the registration cited against it. Applicant's mark and the cited registered mark are, in contrast, strikingly similar, not just in their inclusion of the element "POSTURE," but in the commercial impressions the marks in their entireties generate. Thus, their use on identical products is plainly likely to cause confusion.

Finally, if we had any doubt on this issue, and we do not, such doubt would necessarily be resolved in favor of the prior user and registrant. In re Apparel, Inc., 578 F.2d 308, 151 USPQ 353 (CCPA 1966).

Decision: The refusal to register is affirmed.

R. F. Cissel

E.J. Seeherman

C. E. Walters
Administrative Trademark Judges,
Trademark Trial & Appeal Board

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